THE ALBANY LAW REVIEW

of

RECENT DECISIONS

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COVERAGE OF THE FEDERAL "WAGE AND HOUR ACT"

The general tendency of the bar to criticize recent interpretations of the "commerce" clause by the United States Supreme Court, besides being a manifestation of its conservatism, is a commendable demonstration of altruism. A legal profession motivated by self-interest would be more inclined to rejoice that the Constitution no longer stood still than to deplore that it no longer stood. The mass of labor legislation, bred of the depression and the New Deal, and legitimized by these revolutionary interpretations, would seem to contribute almost as much to the livelihood (and the mental fatigue) of lawyers as of those laborers at whom its beneficence was directed. Besides being fruitful sources of constitutional litigation and administrative proceedings, these statutes have created a wide market for preventive legal advice by their very broad and uncertain application, coupled with the restrictions and sanctions imposed when they are applicable. The obligations imposed upon employers, such as paying specified minimum wages and keeping detailed records in the proper form, are not constant but vary with administrative orders. Inasmuch as a violation subjects him to heavy criminal penalties as well as to suits by his employees to recover double their unpaid minimum wages (plus a "reasonable attorney's fee"), it behooves an employer to keep himself informed on the latest administrative regulations. In order to know just which regulations to keep up with and also because a slight change in operating methods frequently will determine the applicability of a Federal statute, every business man should know which statutes are applicable to himself, - hence the importance of their scope to lawyer and layman alike.

One of the broadest is the Fair Labor Standards Act, popularly known as the Wages and Hours Law, passed in 1938 (29 U.S.C. §201-219). Virtually all business enterprises of any relative size in the nation are covered, but many small businesses are not. It is the purpose of this article to discuss some phases of the scope of its application.

Like all Federal statutes exercising the Congressional power to regulate "commerce among the States", and so depending for their validity on the "commerce" clause of the Constitution, its applicability to a given industry is determined by the extent to which that industry's activities reach across State lines. It should be borne in mind, however, that the question presently to be discussed is not the extent to which a business must engage in interstate commerce in order to subject itself to any constitutional regulation under the "commerce" clause, but the extent to which it must do so to come within this particular Act which was extended judicial blessing only last year. (U. S. v. Darby Lumber Co., 312 U. S. 100, and Opp Cotton Mills v. Administrator, id 126.)

This Wage and Hour Law should not be confused with the Wagner or National Labor Relations Act which governs collective bargaining. The Wagner Act prohibits any person from engaging in an unfair labor practice (defined substantially as discrimination against union members or refusal to contract with unions) which

directly burdens interstate commerce. The Wage and Hour Law prohibits the employment of workers engaged in interstate commerce or in the production of goods for interstate commerce, at other wages and hours than specified. (It also prohibits the transportation in interstate commerce of goods so produced, but this section will, of course, not come into operation without a prior violation of production regulations.) Therefore, although the two statutes overlap extensively, they differ sufficiently in scope to cause each to cover many establishments which the other does not. To come within the Wagner Act, an industry - while not necessarily actually engaged in interstate transportation or communication itself - must be in the direct flow of interstate commerce or otherwise so directly affect it that stoppage of its activities would stop a substantial portion of that commerce (National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1). To come within the Wage and Hour Act, the industry must produce goods for interstate commerce, however small the production or minute its effect on the general flow of interstate commerce. On the other hand, no matter how directly the noncompliance with this statute would burden interstate commerce, no industry is within it which is not engaged in interstate transportation or communication, or in the production of goods for such transportation. The Wagner Act was written on the basis of the "old" conception that regulation of a wholly intrastate activity was valid only when necessary to remove a direct burden on interstate commerce. (See Schecter Poultry Corp. v. United States, 295 U.S. 495, and cases cited therein.) The constitutionality of that Act, therefore, could never be questioned (under the "commerce" clause) but only its applicability to a particular case.

The language of the Darby case (supra), incidentally, presents a nice question as to the extent to which it amplified the scope of the Wagner Act by enlarging the meaning of "direct burden." If the Wage and Hour Act depends for its validity on a finding that substandard labor conditions in any business producing goods for interstate commerce directly burden such commerce (Finding 2 of "Congressional Findings", §2 (Title 29 §202) of the Act), then obviously the scope of the Wagner Act is greatly extended. If, on the other hand, the Wage and Hour Act is upheld by a "substantial effect" (see p. 119 of the Darby opinion) as distinguished from a "direct burden", or by the "reasonable means to a permissible end" doctrine (p. 121 id), the constitutional tests of the Schechter ahd the Jones-Laughlin cases are overruled and the scope of the Wagner Act unchanged. The opinion, read as a whole, would seem to me to indicate the latter conclusion. At any rate, the NLRB has not so far regarded its jurisdiction as extended by the Darby decision.

There are 19 sections of the Statute, but its scope is controlled by the first sentences of §§6 and 7 read in connection with the definitions of §3 and exemptions listed in §13. (§6: "Every employer shall pay to each of his employees who is engaged in [interstate] commerce or in the production of goods for [such] commerce, wages at the following rates***". §7: "No employer shall **** employ any of his employees who is engaged in [interstate]

commerce or in the production of goods for [such] commerce****for a work week longer than****." §3-i: "'Goods' mean goods, wares, ****merchandise****or subjects of commerce of any character, or any part or ingredient thereof****." §3-j: "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof in any State.")

In short, any employee engaged in interstate commerce or employed in any occupation necessary to the production of goods for such commerce must be employed at specified wages and hours. (The Statute is not in terms directed at industries, but at individual employees, wherefore, some employees may be covered while others in the same establishment may not be.)

The three main questions which arise are, (1) When are goods produced for interstate commerce? (2) What occupations are necessary to production? (3) When is an employee engaged in interstate commerce?

WHEN ARE GOODS PRODUCED FOR INTERSTATE COMMERCE?

If, at the time of production, the employer intends to ship his product to a buyer outside the State, then certainly it is being produced for interstate commerce. Also, if he knows or has reason to know that the goods will later cross the line before reaching an ultimate consumer, whether the shipping be done by himself or by another, then too they are being produced for interstate commerce. Since the definition of "goods" includes "any part or ingredient thereof", it is not necessary that they leave the State in the form in which they left the factory in order to come within the Act; it makes no difference how many times they change hands or form before crossing the line. Employees processing molasses for sale to a candy manufacturer who sells the candy in interstate commerce are engaged in producing goods for interstate commerce; or a a firm making buttons for a garment manufacturer, etc. However, if the first employer justifiably believes that his buyer will sell all the finished product inside the State, the fact that some of it eventually does find its way into the flow of interstate commerce before reaching a consumer will not relate back to the time of production and render the employer a violator. Similarly, destruction or unanticipated diversion of goods produced with intent to ship outside will not absolve the employer from liability. The knowledge or intent at time of production - not the subsequent events - determines whether the production is for interstate commerce. It should be noted that the origin of the raw materials is immaterial; it is the destination of the finished product that controls.

Most of the cases so far decided are in accord with the above propositions. Apparently in a class by itself is Bagby v. Cleveland Wrecking Co., 28 Fed. Supp. 271, in which a Federal dis-

trict court in Kentucky decided that employees engaged in cleaning building materials salvaged from old structures, to be shipped outside the State and sold, were not covered by the Act. They said that a local transaction was not made interstate merely because the goods handled later left the State. That would be sufficient answer to an argument that plaintiff was engaged in interstate commerce but completely ignores the contention that he was engaged in the production of goods for such commerce. In view of the statutory definition of "production" to include any handling or working on the goods, there would seem to be no logical basis for this decision. The Court, having in mind the ordinary meaning of 'production", perhaps considered that Congress intended to include only processing or handling of the goods during the course of their original preparation for use - not subsequent salvaging operations. The Congress could easily have indicated such an intention. The presumption that they conceived of no such limitation is fortified by the fact that interstate commerce would be equally burdened by substandard labor conditions occurring before or after original use of the goods. Such a narrow interpretation of the broad statutory definition of "production" has been accepted by no other court.

A question immediately arises as to a concern's selling its wares both within and without the State; what employees are engaged in production of goods for interstate commerce? The answer is, that unless the employer can show just which employees worked on which goods, they will all be entitled to the benefits of the Act. He cannot stop with showing that a certain percentage of the goods went outside the State and that he paid a corresponding percentage of his workers the required wages, but must further show that every worker not paid those wages was not engaged in the production of those goods. It would obviously be unfair to permit an employer arbitrarily to select the workers to receive the benefits and futile to speculate on which workers had done which work, hence the advantage in some cases of segregating intrastate work from interstate. The most efficient production, however, usually necessitates each worker's doing something to each article, making segregation impracticable.

A subsidiary question is, what proportion of the output must find its way across the borders to subject the whole concern to regulation? If one article out of thousands produced in a week leaves the State, does that bring the entire establishment within the Act? The answer would seem to be yes, for, if at the time of production the employer expects any article in production to reach an outside consumer, all employees who worked on that article are covered and the burden is on the employer to prove any exceptions. A few cases have held to the contrary, but most of them can be distinguished on the ground that those concerns would have been exempt anyway as retail establishments under §13. Lamb v. Quality Bakers (Tennessee Court of Appeals, not yet officially reported, but found in full in Wage and Hour Manual, 1941 Ed. p. 702); Goldberg v. Worman 37 Fed Supp 778; Hooks v. Nashville Breeko Block & Tile Co., 39 Fed. Supp 369. Their reasoning is that isolated transactions in which goods are sent outside the State do not transform the substantial character of the business into production for interstate com-

merce. It is doubtful that this interpretation of "production for" will be finally or universally accepted. These cases, like the Bagby case (supra), are probably manifestations of the oft encountered judicial distruct of revolutionary statutes that oppose and upset established legal principles. While they are yet fresh upon the books and before their novelty has departed, the courts seem reluctant to enforce such disturbing laws according to their apparent tenor

Another possibility is that the same employee will be part of the time engaged in interstate production, and part of the time in intrastate. He is not entitled to the benefits of the statute during the latter period, but the unit of "time segregation" is the workweek. If, at any time during a workweek, an employee works on goods destined for interstate commerce, he is entitled to the minimum wages for the entire week.

Since the definition of goods includes "articles or subjects of commerce of any character", the Administrator has considered banking houses, companies that compile and transmit information in the form of pamphlets, etc., as included. He has so far met with no judicial reverses on this point, but in view of the list of words preceding this general language, I would think the rule of ejusdem generis would limit "goods" to things like commodities, wares, and merchandise. However, it can be argued that the statute, being remedial, is to be liberally construed to effect as far as possible its beneficial purpose. (Wood v. Central Sand & Gravel Co., 33 Fed. Supp. 40; Divine v. Levy, 39 Fed.Supp. 44.) By constantly and regularly using the mails to carry on their business, such concerns may be argued as being "engaged in interstate commerce" even if not "producing goods" for such commerce.

Still another problem arising under the question, when are goods produced for interstate commerce, is that of experimental production. The case of Gill v. Electro-Manganese Corp., Tenn. , 146 S.W. 2d 352, holds that a concern engaged in experimental production of manganese by electricity to determine whether such production would be commercially feasible was not covered by the Act before regular production was commenced and before any of the manganese produced at the plant was sold outside the State. Of course experimental research carried on as part of an established business to improve its product would be held to be part of the production as a "process necessary to production."

WHAT OCCUPATIONS ARE NECESSARY TO PRODUCTION?

This is the most vexing question of all, since a literal interpretation would include almost any human activity having any relation to production, however remote. For instance, people are necessary to production, but I doubt that even the Administrator (who is inclined to view the statute liberally) would seek to include nurses and other employees of hospital maternity wards on the ground that they were employed in an occupation necessary for the production of goods for interstate commerce. He has even

expressed justifiable doubt as to whether the statute would extend to coal miners producing coal for consumption in the same State by a factory producing goods for interstate commerce, although since power is necessary to production, they certainly come within the letter of being engaged in an occupation necessary to production, as do employees of virtually all electric power companies. He has, however, expressed no doubt that a manufacturer of tools for that same factory would be covered.

"There are cases, however, where employees producing goods for use entirely within the State of production can be said to be engaged in a 'process or occupation necessary to the production' of other goods which move out of the State of production, and are, therefore, subject to the Act. This would be true of the employees of a tool and die concern which sells all its products within the State for use by a producer of goods for commerce. **** A much more doubtful case is the one of the small mine selling all its coal in the State to a local manufacturer engaged in the production of goods for commerce, the manufacturer using the coal to heat his plant or to drive his machinery. Are the employees of the mine engaged in a 'process or occupation necessary to the production' of the manufacturer's goods which move in interstate commerce? We feel that we should refrain from taking any position on a case which we believe to be so clearly poised on the borderline between coverage and non-coverage." (§11, Interpretative Bulletin No. 5; Wages and Hours Division, Department of Labor.)

It seems reasonable that the purpose of such broad language was to include all workers about the plant itself,- such as maintenancemen, bookkeepers, watchmen, and others who would otherwise not be engaged in production since they don't touch the goods nor run the machines - rather than to reach out to all the industries performing secondary services to the primary concern. Of course, if the primary concern made its own tools, there could be little doubt that the men producing the tools were engaged in an occupation necessary for the production of the goods, and since the statute is based on only the occupation of the employee, making no mention of his employer, it can be argued that the statute extends to all such situations as the Administrator desires to regulate. Furthermore, we are again faced with the alleged necessity for a liberal construction. It seems to me that a line may well be drawn between those occupations necessary to production and those merely incidental to it. The case of Farr v. Smith Detective Agency or Watch Service, Inc., 38 Fed. Supp. 105, is authority for this point of view. The defendant company furnished many business concerns with watchmen and detectives, among whom was plaintiff, and he sued for unpaid minimum wages for the period he was assigned to guard a concern that happened to be engaged in interstate commerce. The court held that such an assighment did not thereby thrust his employer into interstate commerce. An even stronger case against the Administrator's contention is that of Killingbeck v. Garment Center Capitol Inc., 259 A.D. 691, - another employees' action, the defendant being the owner of a loft building occupied by a ladies' garment manufacturer. Plaintiffs were a watchman and a carpenter employed by defendant lessor to guard and maintain the building. In holding that plaintiffs were not engaged in the production of goods

for interstate commerce, the Court said, "We think the statute does not include such employees when they are not employees of a manufacturer who produced the goods. It may include a watchman or carpenter employed by the manufacturer even though such employees are not directly engaged in production of the goods because they may be employed in an 'occupation necessary to the production thereof.' We would ***distort the statute if we should apply it to employees of others than the manufacturer, having so remote and indirect relation to production of the goods as the watchman and carpenter employed by a landlord, a portion of whose premises have, perhaps fortuitously, been rented to tenants engaged in interstate commerce."

Another landlord who likewise leased a loft building to a ladies' garment manufacturer found a less sympathetic tribunal in a Federal District Court in Pennsylvania, which didn't hesitate to "distort the statute." Fleming v. A. B. Kirschbaum Co., 38 Fed. Supp. 204. That was an action by the Administrator for an injunction and might possibly be distinguished on the ground that the services rendered by those employees were much more vital to the business, since they not only guarded the building and kept it in repair, but operated the boilers to provide heat and electricity, operated the elevators, etc. On facts identical with those, however, a Federal District Court in New York followed the Killingbeck case (supra), Fleming v. Arsenal Bldg. Corp., 38 Fed, Supp. 207, The decision was based partially on the ground that the landlord was conducting a "service establishment" and therefore exempt under §13,- a dubious interpretation of "service establishment." The decision was reversed last December by the Circuit Court of Appeals (Second Circuit, not officially reported but summary of opinion may be found in Wage and Hour Reporter, Vol. 8) soon after the Kirschbaum case was affirmed. The Supreme Court granted certiorari last March 2d, and so we may expect that question to be settled soon, probably in favor of the Administrator. Such a decision would by no means uphold the Administrator in his contention that the statute covers an entirely separate industry manufacturing machinery. It seems reasonable that the statute may extend to all "necessary" employees, in the building, regardless of who employs them, but not to those in an entirely separate plant carrying on an entirely separate activity only remotely related to the goods, unless they are employed by the producer of the goods for interstate commerce. The reasoning of the Killingbeck case that "employees of others than the manufacturer, having so remote and indirect a relation to production of the goods" are not covered, may very well be correct, although perhaps misapplied to the facts in that case.

Construction of the factory is at least as essential to the production of goods as is maintenance, and so it might be expected that the Administrator would include employees of contractors who build new plants. Astonishingly enough, he does not. "It is our opinion that employees engaged in the original construction of buildings are not generally within the scope of the Act, even if the buildings when completed will be used to produce goods for commerce*** but employees of contractors who are employed in maintaining, repairing, or reconstructing buildings or machinery used to

produce goods for commerce would seem to be engaged in a 'process or occupation necessary to the production' of such goods**** and therefore, within the coverage of the Act." (Interpretive Bulletin No. 5 §10.) He states no reason for this distinction, but it can be justified on the ground that no one can very well be engaged in the production of goods before any goods are in the process of production.

Another group of conflicting cases relates to plant watchmen. Whenever they do anything in addition to watching - such as firing boilers, or running machinery, - they are invariably held to be engaged in an occupation necessary to the production of the goods. When they do nothing but guard goods in the process of production, however, some courts have held that they are employed in an occupation necessary to production, and others to the contrary. The first such case involved a small junk business handling wornout cars, retailing most of the automobile parts locally, but shipping scrap metal outside. Rogers v. Glazer, 32 Fed. Supp 105. Plaintiff watchman was employed to watch both the scrap and the parts for retail and although the court said that a watchman was not engaged in handling the goods, it stressed the smallness of the business and the small proportion of it which was interstate, and could have considered plaintiff excluded by §13 exempting employees "engaged in a retail establishment, the greater part of whose selling is in interstate commerce."

This case was soon distinguished on the ground its small size and the retail character of its business, in Lefevers v. General Export I. & M. Co., 33 Fed Supp 838. That was also a junk business but a large one, continually shipping quantities of scrap metal out of the State, and plaintiff, whose sole duties were those of night watchman, was held to be within the Act.

However, the highest court of North Carolina recently reaffirmed the rule of the Glazer case in a case involving a watchman in a slaughterhouse which shipped meat products. Hart v. Gregory, 220 N.C. 180, 16 S.E.2d 837. They held that the trial judge correctly charged the jury that if they should find that plaintiff had no other duties than those of a watchman, they should return a verdict of no cause of action, saying that to give the statute sufficient elasticity to cover a man who was employed only to watch the building would be a perversion of its language. On the other hand, the highest court in Tennessee, on facts substantially the same as the Lefevers case, followed that decision. (Robinson v. La Rue, ____ Tenn. ___, 15 S.W.2d 432). Probably the matter will finally be determined in favor of coverage. It seems reasonable that where a business produces goods for interstate commerce, practically all employees should be covered, since their inclusion in the payroll is fairly conclusive evidence of their necessity to production.

WHEN IS AN EMPLOYEE ENGAGED IN INTERSTATE COMMERCE?

At the outset, it may be said that any employee engaged in interstate commerce for puroses of the Federal Employers' Liability Act. is also covered by the F.L.S.A. Roughly, this

includes everyone engaged in operating or maintaining the instrumentalities of interstate transportation or communication. (Exempted from the hours regulations of §7 by Part (b) of §13, however, is "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to §204 Motor Carrier Act, 1935; or any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.") In addition, any employee handling goods in the direct flow of interstate commerce so as to be an essential part of the stream of such commerce is covered, whether or not he works for a transportation company. Goods are in the flow of interstate commerce until they come to rest in the State of destination, but as might be anticipated, the difficulty is in defining a "coming to rest." Whenever goods are delivered to a processor or an ultimate consumer within the final State, they certainly "come to rest for purposes of the Act. The questionable cases arise when goods are delivered to a middleman handler who sells those identical unchanged goods to others, - either consumers or retailers. (If he sells to consumers he may be exempt as being a retailer (§13) even though in the stream of commerce.) If the goods stop in his establishment to become part of his general stock and are then late sold to the casual buyer, they have come to rest. If, on the other hand, the wholesaler takes orders from his customers and fills them by ordering from an outside supplier, directing shipment to the customer, he and his employees are essential parts of the stream of commerce. In such a situation he will not remove himself from interstate commerce merely by directing shipment to him rather than to his customer, since the goods will flow steadily through his warehouse. Continuing with the "stream of commerce" analogy, his warehouse can be likened to a pool or reservoir in the stream where the flow is temporarily impounded, rather than the mouth of the stream where the flow ceases. This can be so even where the wholesaler orders the goods before they are ordered of him by any particular customer. Whether the goods are sold to a customer before or after theyare ordered or received from outside is merely another factor to be taken into consideration. Still another highl important factor is, whether the order of goods which reaches the customer is the same order filled by the outside supplier, or whether a bill of goods is sent to the employer who then breaks it up and sells the individual articles in different quantities to different customers. It is here what we meet the "original package doctrine. Initially proposed as a controlling test of where interstate commerce began for the purpose of determining the validity of State regulations, this doctrine has, in later decisions, come to be regarded -at least in this connection - merely as some evidence of whether the goods have come to rest. All these factors must be considered and each case examined in the light of its own circumstances to determine whether the establishment in question is, to change the metaphor, the end of the line or merely the penultimate car stop.

In this connection, it should be noted that where the goods do come to rest within a given establishment, they do so from the moment of their delivery inside the State to an employee of that establishment. This is contrary to the contention of the Ad-

ministrator. "** *it seems they [such employees] cannot be considered as 'engaged in [interstate] commerce', because they are working on or processing goods that have come to rest within the State and have ceased to be articles moving in interstate commerce. Other employees in the same plant, however, such as employees purchasing the raw materials from other States or handling or unpacking them upon receipt from other States, may be 'engaged in commerce', and therefore, entitled to the benefits of the Act." (Int. Bill. No. 5 §10.) It probably was pure coincidence that caused the Administrator to omit the parenthetical qualification, "interstate" before the word, "commerce" in the last sentence, but the oversight illustrates the effect of his classification. He speaks of the goods as having "come to rest", but throws no light upon the point at which, in their constant movement from the carrier through the factory to the outgoing platform in their finished state, their "rest" commenced. Such a classification would seem to render futile any attempt to distinguish between commerce within a single State and "commerce among the several States", pretty effectually obliterating the boundaries it purports to define. It has been accepted by no case, and rejected by at least one. "It is argued that the employees of the defendant, when hauling the goods from the boat or railroad freight depot, and when unloading commodities from the interstate trucks into the store, were engaged in interstate commerce. The Court cannot approve this contention. When the interstate carrier delivered the goods to the defendant, the interstate commerce ceased. Any movement thereafter of such goods was purely intra-state. A delivery of the goods to the employee of the defendant was, of course, a delivery to the defendant." Gerdert v. Certified Poultry & Egg Co.,Inc., 38 Fed. Supp. 964. (The prior conclusion of the Court that the goods did not come to rest in that establishment, may possibly be open to question; see Fleming v. Altman, 38 Fed Supp. 94.)

Lastly, it should be noted that an employer does not engage himself or employees in interstate commerce merely by moving his own stock of goods or tools across a State line. A transfer of goods by a chain store from its Illinois warehouses to some of its Indiana stores, was held not to be a flow of interstate commerce. Fleming v. Goldblatt Bros., 39 Fed. Supp. 701. (Such a practice, carried on regularly and constantly, might well be considered a part of interstate commerce, and the above case may be open to criticism on this account.)

EXEMPTIONS

Many businesses otherwise covered by the language of the Act are exempted from its operation by the provisions of §§7 and 1. Industries granted exemption from §7 (relating to hours) are those "found by the Administrator to be seasonal", and those engaged in the processing of certain agricultural products, some of which must, in addition, be within the "area of production (as defined by the Administrator)."

The more important of the total exemptions listed in §13

are, people employed in executive or professional capacities (as such terms are defined by the Administrator); those employed in retail or service establishments, the greater part of whose selling or servicing is in intrastate commerce; those engaged in farming or fishing; and seamen.

Exempted from the hours regulations of §7 by Part (b) of §13 is "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to §204 Motor Carrier Act, 1935; or any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

Thus, some exemptions are automatic and their definition left to the courts; others are automatic but their definition left to the Administrator; and still others require a special finding by the Administrator in order to be op.rative. For example, to be exempt as seasonal, an industry must be specifically exempted by administrative order. The Administrator has defined a seasonal industry as one dependent upon climatic conditions for its raw materials, and listed many such industries which he has exempted. Even though an industry falls within the Administrator's definition of seasonal, it is not exempt from regulation under the statute, until included in his list. The procedure in such a case, is, to make application for exemption, and, if necessary, review a denial of such, in the courts. Where the Administrator is given power to define a term, such as "professional", or "exclusive", as distinguished from power to make a finding of exemption, his definitions are binding on the courts unless so arbitrary and unrelated to the word to be defined as to be an abuse of his statutory discretion.

The broadest exemptions, directed at industries rather than employees, are those relating to retail and service establishments. These exemptions are automatic and their definitions left to the courts, but the Administrator has indicated in Interpretative Bulletins the meaning he places on them in administering the Act, and such interpretations probably carry some weight with the courts. One characteristic of a retail establishment is that it sells goods to the ultimate consumer for use or consumption by himself rather than for resale to another. Another characteristic is that such sales are usually to householders in small quantities, rather than to industries in large quantities. Thus a coal dealer selling coal to home owners in small lots would be a retailer, but one selling large quantities to industrial concerns, at discounts, would be a wholesaler, even though the coal was sold to the buyer for use and not for resale. Where both kinds of sales are made, it is a question of whether the business is subs antially wholesale or substantially retail. A business on the borderline would not be entitled to exemption as a retail establishment. It should be noted that the mere fact that a business is retail will not entitle it to exemption; it must make the greater part of its sales in intrastate commerce. Thus, to be exempt, probably 75% of its sales should be retail, and in addition, over 50% of its total sales must be to buyers within the State. Service establish-

ments are like retail establishments except that they sell service instead of goods. Typical examples are barber shops, beauty parlors, garages, restaurants, hotels, laundries, and dry cleaners. Many establishments, such as roadside service stations, come within both of these exceptions.

The present uncertainty regarding many phases of the Act may be attributed to the fact that most of the cases so far have been decided by inferior Federal courts widely scattered throughout the Nation, that have been viewing a new and revolutionary statute in the light of widely differing constitutional conceptions and economic and social predilections. As the cases work their way up through the appellate courts, we may expect the uncertainty gradually to dissolve and the boundaries of the Act to take more definite shape. The effect of the war on this process of clarification and definition will probably be to retard it still further as the zeal of the Division to enforce the law is tempered by the national reluctance to impair war production.

DOUGLAS L. MANLEY

SUMMARY JUSTICE AGAINST RECALCITRANT DEBTORS

A common and well justified complaint of practicing members of the bar is the ease with which a recalcitrant debtor, although unquestionably liable upon an account, can demand all the legal safeguards extended to other litigants, and thereby delay unduly the collection of indisputably owing debts. Amendments to the Civil Practice Act have attempted, with partial success, to provide a more summary form of justice for such cases. C.P.A. §374-a (Entries in the regular course of business), adopted in 1928, made such a cause of action much easier to prove. Rule 113 of the Rules of Civil Practice (Motion for summary judgment), adopted in 1921, greatly speeded up the obtaining of a judgment in a case where the defendant claims to have, but does not actually have, a bona fide defense.

There is still another, and not so well known, provision in the C.P.A. which is designed to "narrow and define the field of controverted facts, primarily for the benefit and convenience of the plaintiff, and incidentally to save the time of the courts." In 1923 the following section was added, and amended in 1927:

> C.P.A.§255-a.- Items Of Claim May be Included in Pleadings in Actions Involving The Sale andDelivery of Goods, Or Performing of Work, Labor. and Services. In any action involving the sale and delivery of goods, or the rendering of work, labor, or services, or the furnishing of materials, the plaintiff may, in a schedule attached to and forming part of his verified complaint, set forth and number the items of his claim and the reasonable value or agreed price of each. Thereupon the defendant by his verified answer must indicate specifically the items, if any, which he disputes in respect of delivery, or performanance, reasonable value, or agreed price.

To summarize briefly: Applicable to the following causes of action - (1) For the sale and delivery of goods, (2) For the rendering of work, labor, or services, (3) For the furnishing of materials -

Plaintiff's procedure:

1. Draw up a schedule. The schedule must (a) set forth each item of his claim, (b) number the items, (c) set forth the reasonable value, or the agreed price, of each item.
2. Attach such schedule to and make it a part of his complaint.
3. Verify his complaint.

Legal effect of such a pleading: The defendant, if he wishes to raise an issue of fact as to delivery, performance, reasonable value, or agreed price, must:

1. Indicate specifically in his answer the items which he disputes in respect of such fact or facts.
2. Of course, verify his answer.

In order to claim the benefit given by this Section, the plaintiff must put his schedule in proper form. The separate items must be numbered, and such numbering is an essential part of the pleading. Gathering the items together into three numbered groups is not a sufficient compliance with this Section. (Innis, Pearce & Co. v. Poppenberg, Inc.(1925) 213 App. Div 789). And if the dates alleged in the schedule do not correspond with those alleged in the complaint, that also is a fatal defect, and the plaintiff in such a case can not claim the benefit of this Section. (Lasker v. Goldbaum (1932) 143 Misc. 775.) It would seem that a proper schedule would be set up in the following manner:

Item Number	Brief description of goods, materials, or services	Date delivered or furnished	Agreed unit price and reasonable value	Total
1	4 tons egg coal	Mar. 24, 1942	$12.00 Ton	$48.00

Besides its being used in the types of actions specifically mentioned in the statute, it may also be properly used in an action to recover the rental price of equipment. (Anderson v. City of New York (1940) 258 App. Div. 588); and in an action for the purchase price of merchandise sold and delivered under a contract which had been entered into in reliance upon the defendant's fraudulent misrepresentations as to his financial position. (Berker v. Rubin (1932) 145 Misc. 666).

Now let us see what sort of an answer must be interposed when the plaintiff has incorporated a proper schedule into his verified complaint in compliance with this Section. The cases repeatedly say: "Where a complaint is properly framed under this section, the effect is to take away from a defendant the right to traverse by a general denial the allegations of delivery, reasonable value or agreed price. If the defendant desires to controvert the items, or any ofthem, in respect to those matters, or either of them, he must do so by specifically denying the numbered item or items in the respect controverted. Notwithstanding a general denial, any item not specifically denied stands admitted in respect to delivery, reasonable value or agreed price as stated in the schedule. No motion to strike out or to compel an amendment is necessary." This quotation will bear re-reading, for a proper understanding of it will give the key to the whole section. There is not a wasted word in the entire quotation, and every word should be emphasized. Contrast the effect of a general denial with that of a specific denial. Note that only certain allegations have to be denied specifically. Dynamo Inc. v. Brown, Inc., (1931), 139 Misc. 867, raises, but does not answer, the question as to whether this section requires that a defendant indicate specifically not only each item that he disputes, but also whether he disputes the delivery, performance, reasonable value, or agreed price of such designated item. Since this very same case states that the object of the section is to "narrow and define the field of controverted facts", it would seem that the defendant should be required to deny specifically the fact of price and the fact of delivery, rather

than allowed to deny both facts together by a general denial addressed to a specific item. This is where the moral coercion of the statute comes into play, for often a debtor is willing to swear to a general denial of a whole cause of action, but would balk at denying specifically such details as agreed price and delivery, particularly when he knows that a contract or delivery slip with his signature on it is in the possession of the adverse party.

So much for what the courts say about this section. Let us now examine the cases and see what disposition they will make of the defendant's answer, when the plaintiff has properly complied with C.P.A.§255-a. In the following cases, these points should be noted: 1. The contents of the answer, 2. The particular type of motion that is being made (usually by the plaintiff), and 3. The disposition of such motion.

In Star Show Case Co. v. Szekely (1929), 135 Misc. 723, the plaintiff sued for labor performed and materials furnished, and annexed a proper schedule to his verified complaint. The defendant's answer admitted all the allegations of the complaint except the reasonable value of the services, and he generally denied the schedule. The plaintiff now moves for judgment on the pleadings. The court granted the motion, with leave, however, to defendant to plead over within ten days.

In Raymond v. Davy, (1936) 160 Misc. 388, the plaintiff sued for merchandise sold and delivered to plaintiff's assignor, and attached a proper schedule to the complaint. The defendant's answer denied, upon information and belief, each and every allegation contained in the complaint. The plaintiff now moves for an order striking out the answer, and for summary judgment. The court held that the denial did not create an issue, and struck out the answer, and directed the clerk of the court to enter judgment in favor of the plaintiff, thus granting both motions.

In Sinram Bros. v. Naples Realty Co., (1928) 224 App. Div 369, the plaintiff sued for the purchase price of coal sold and delivered, and attached a proper schedule to its complaint. Defendant's answer denied the allegation of sale and delivery, but did not indicate specifically the items which it disputed in those respects. The court held that were it not for the counterclaim for $1,000,(for breach of warranty of the coal) the plaintiff would be entitled to judgment on the pleadings.

In International Milk Co. v. Cohen, (1927) 219 App. Div. 308, the plaintiff sued for milk sold and delivered, and attached a proper schedule to its complaint. The answer, to quote the court "simply denied the allegations as to sale and delivery by general denial." The plaintiff now moves for summary judgment upon the ground that the answer interposed was sham. The court granted the motion, Kelley, P.J. holding: "If a defendant admits delivery and agreed price or reasonable value by omitting to specifically point out the disputed items, it seems to me he must plead facts showing why he has not paid the bill." It should be noted that the general denial was addressed to the allegations of both sale and

delivery. Apparently the general denial was addressed to the entire complaint. Therefore, this case would seem to be authority to the effect that a general denial addressed to a complaint which properly incorporates a schedule, is insufficient to raise any issue of fact. However, note the type of motion which is granted in the present case.

In Dairymen's League v. Levy Co., (1929) 225 App.Div. 475, the plaintiff sued for goods sold and delivered, and attached a proper schedule to its complaint. Defendant's answer was a general denial. The defendant now moves for a bill of particulars. The court denied defendant's motion on the ground that the answer was "not sufficient to put in issue the items constituting the plaintiff's cause of action for goods delivered and sold."

In Bertolf Bros. v. Leuthardt, (1941) 261 App.Div. 981, the facts do not clearly appear. The plaintiff's complaint complied with C.P.A. §255-a. The plaintiff now moves to strike out certain paragraphs in the defendant's answer, and for summary judgment. The court granted both motions, holding: "Insofar as the plaintiff's claim is concerned, the defendant failed to raise any triable issue by failing to indicate specific items contained in the schedule attached to plaintiff's complaint which he disputed."

It would seem, from the above cases, that if a plaintiff properly complies with §255-a, and the defendant's answer is a general denial, such an answer would not be sufficient to raise any issue of fact, and the plaintiff would be entitled to have judgment entered in his favor on the pleadings. But a close examination of these cases will reveal that such a holding is mere dictum, for in none of the above cases was a judgment on the pleadings granted in a case where a general denial was interposed to an entire complaint.

Moreover, the two following cases appear to complicate the situation. In S. & D. Dress Co. v. Eckstein, (1924) 123 Misc. 525, the plaintiff sued for dresses sold and delivered, and attached a proper schedule to the complaint. The defendant interposed a general denial, and also a separate defense to the effect that eight dresses out of the ten sued for were delivered on memorandum, and that two of the dresses were purchased on terms which rendered the bill not yet due at the time when suit was brought. The trial court below, on plaintiff's motion, had stricken out the general denial on plaintiff's motion. The appellate court here reversed the order, holding: "It is quite evident that defendant disputed neither delivery nor the reasonable value nor agreed price of any of the items, but denied the sale. His general denial was, therefore, perfectly proper.. This holding should be contrasted with the holding in International Milk Co. v. Cohen, supra: In both cases the allegation of a sale to defendant was traversed by a general denial. The apparent distinguishing feature in the present case is the additional fact that here the general denial was supplemented and explained by a specific denial. The specific denial made it clear that the defendant denied that there was an agreed price, rather than what the agreed price was. This case, however, is authority for the proposition that a general denial, at least when

supplemented by a specific denial addressed to the items, is sufficient to raise an issue as to the allegation of sale.

In Guth Co. v. Gurland,(1935) 246 App. Div, 67, the plaintiff sued for goods alleged to have been sold to the defendant and delivered to one T., whose connection with the defendant does not appear. Plaintiff attached to his complaint a proper schedule of the goods. The defendant by his answer denied the allegations of Paragraph 2 of the complaint, which alleged a sale of the goods to him. Defendant's answer did not sufficiently deny the allegations of Paragraph 4, which by reference to the schedule annexed to the complaint, set forth the items of plaintiff's claim. The plaintiff now moves for judgment on the pleadings. The court denied the motion, holding: "The sale to the defendant having been denied, judgment on the pleadings could not be granted in favor of the plaintiff, even though the defendant failed to comply with CPA §255-a in his denial of the allegations of the complaint which incorporate the items of the plaintiff's claim. By failing adequately to deny those allegations, the defendant precluded himself from disputing the delivery to T., the reasonable value and agreed price. But he is not precluded from disputing the controverted allegations of Paragraph second which seek to charge him as the purchaser of goods delivered to another. He is no more precluded from disputing the sale to him than he would be precluded from disputing the incorporation of the plaintiff if he had tendered such an issue. Section 255-a does not provide that a defendant who fails to indicate specifically the items, if any, which he disputes is thereby deprived of all opportunity to defend but only that delivery or performance, reasonable value, or agreed price are deemed to be admitted unless the denial is in the prescribed form." This quotation is also a key quotation, like that on page 62 of this article, and together the two effectively and accurately explain the effect of the section. (But note that if the complaint alleges that the same was made to a third party - T - and that delivery was made to the defendant, which is a reversal of the allegations here, a general denial to a complaint which had properly incorporated a schedule would raise no issue, because proving a sale to T. would not be an essential part of the plaintiff's cause of action. The fact that the defendant still retains the goods with knowledge of the facts, amounts to a ratification. "In the case of a purchase of goods, if the purchaser receives the goods and, after notice that they are furnished by another, appropriates them, he ratifies the filling of the order by the other person, and there may be a recovery." Such were the facts and the holding in International Milk Co. v. Cohen, supra.)

Certainly we should not quarrel with the result in Guth Co. v. Gurland. But it does aptly illustrate the difficulties that may be encountered under this section. Assuming that by a general denial the defendant does nevertheless admit agreed value, and delivery, there next arises the question, just how much such admitted facts embrace, i.e., what composite facts are contained in such admitted facts. Do they constitute facts which, if admitted, are sufficient to constitute a cause of action? To answer this question, we must first ascertain what facts the plaintiff must

show in order to set up a cause of action. He must show a contract of sale with the defendant, and due performance of the conditions of said contract on his own (plaintiff's) part. An admission of delivery would in effect be an admission of due performance, for in the vast majority of cases that is all that the plaintiff is bound to do under a contract for the sale and delivery of goods. But does the defendant also admit that the delivery was made to him? It would seem that it should not be construed as being such an admission, for such would practically be the admission of the entire cause of action. Likewise, let us consider the admission of the agreed price or prices. How could there possibly be an agreed price, and yet no contract of sale? Here again, ordinarily, an admission of one would constitute an admission of the other. But this case points out that the two terms are not necessarily synonymous. It might very well be that although there was an agreed price, nevertheless (1) the contract was not made with the defendant, or, (2) even though made with the defendant, it was not a contract of sale, or (3) even though a contract of sale, and made with the defendant, by the terms of the contract the price is not yet due. Therefore, in a case where one of such issues is sought to be raised, it seems indubitable that a general denial would raise a question as to such issues. But as a practicable matter, it would seem advisable that the pleader not only generally deny the complaint, but also deny specifically the allegation of sale, as was sone in S.& D.Dress Co. v. Eckstein, supra, and thus make it plain to the court just what allegation is being denied.

Next comes the problem of choosing the proper remedy to dispose of an incorrectly pleaded answer. The courts have repeatedly said: "No motion to strike out or to compel amendment is necessary." Yet International Milk Co. v. Cohen, Anderson v. City of New York, Raymond v Davy, and Bertolf Brothers v. Leuthard, -all supra- show that the plaintiff has sought and been granted relief in the form of an order striking out the answer and granting the motion for summary judgment, which two motions were combined.

In Fink v. Wagner, (1932) 235 App. Div. 850, the plaintiff sought his relief by a motion for summary judgment, which was granted.

In S. & D. Dress Co. v. Eckstein, and Lasker v. Goldbaum, both supra, relief was sought by motion to strike out the answer, no other remedy being sought. The motions were denied in both cases on the merits, and the court in both cases questioned whether this was the proper motion to bring in such a case.

In Star Show Case Co. v. Szekely, supra, the plaintiff's motion for judgment on the pleadings was granted. Note that here, all the complaint was admitted except the reasonable value of the services as set up in the schedule, which reasonable value was not properly denied.

We would conclude that:

A motion to strike out the answer is not only unnecessary.

but also improper, at least when not joined with any other motion.

A motion for judgment on the pleadings is proper only when issues traversed are those of delivery, performance, reasonable value, or agreed price, and of course where such issues are improperly traversed.

A motion for summary judgment is unquestionably the best remedy. In such a case, it would seem that the plaintiff would not have to prove by affidavit his entire cause of action, but only such facts as are properly traversed. (Johnson v. Briggs, 12 N.Y.Supp 2d 60.) So, if the defendant did not properly deny delivery and agreed price, it would seem that the only thing the plaintiff would have to show by affidavit is that said delivery was in fact made to the defendant. This is all that is necessary to establish a cause of action (International Milk Co. v. Cohen), reasonable value having been admitted.

Therefore, we may conclude that the object for which this section was designed ("to narrow and define the field of controverted facts, primarily for the benefit and convenience of the plaintiff, and incidentally to save the time of the courts"), has in fact been attained. It is a fair and just regulation of pleading, for in a proper case it would save the plaintiff the time, trouble, and expense of proving the prices and delivery of a large number of articles, which perhaps were sold under many separate contracts, and delivered by various employees of the plaintiff, some of whom may not now be in his employ.

Viewed together, the cases decided under this section seem to have provided substantial justice. And this section has proved to be a useful tool to the pleader, not only in aiding him in obtaining judgment, but it would also seem that the incorporation of a schedule in the complaint would avoid a demand under Rules of Civil Practice §115, for a copy of the items of the account, or a bill of particulars of the claim.

B. FULLER ALLEN

AN ANALYSIS OF THE NEW MOTOR VEHICLE RESPONSIBILITY ACT

On the 29th of April, 1941, Governor Herbert H. Lehman placed his signature of approvel upon Chapter 872 of the Laws of 1941, which amended Article 6-a of the Motor Vehicle & Traffic Law in force in New York State. The bill was known as the Page-Anderson Act, popularly described as the New York Motor Vehicle Responsibility Act. The Legislature appropriated the sum of $250,000 and authorized the Commissioner of Motor Vehicles to expend that sum in making preparations for the enforcement of the enactment, which was to be effective January 1, 1942. The express purpose of the statute is to reduce the number of claims which arise out of automobile accidents, but cannot be satisfied because of the lack of financial responsibility on the part of the person through whose negligence the accident was caused.

Prior to the passage of this legislation, a deplorable condition existed in New York State, and legislators spent much time and research in an effort to supply the proper remedy. Approximately 37% of the car owners in New York at that time, carried a voluntary liability insurance policy, while an additional small percentage carried insurance because they were required to do so, following violation of the Vehicle & Traffic Law. At the time the latest survey was made, there were approximately 2,750,000 cars registered in the State of New York, and being operated upon its highways, thus we have more than 1,500,000 cars upon which no insurance has been issued. A special committee organized at Columbia University for the purpose of analyzing the problem and formulating a remedy, reported that in accident cases in which an insured defendant was involved, 85% of the injured parties recovered monetary damages. Contrasting this figure with the report that, in cases involving a defendant who did not carry insurance, only 25% of the persons injured sustained a monetary recovery, we fully realize the need for a more strict regulation of the motor vehicles being operated upon the highways of our State. Several methods of reducing the number of unsatisfied claims by compulsory insurance legislation were proposed and all received intense consideration.

First to be proposed was a system of compulsory insurance patterned after the Massachusetts plan, which failed to meet the approval of the legislators and the educators on the committee. Massachusetts, since the inception of its Compulsory Liability Insurance Law, has experienced acontinuous controversy between the car owners and the insurance companies. At the present writing, an examination of the situation finds the insurance companies undergoing a severe financial strain due to the prevailing low rates established by the Commissioner of Insurance, who may exercise an uncontrolled discretion in setting the rates to be charged. The public has, as usual, demanded a very low rate, and, to date, there has been little success attached to the efforts of the insurance companies to collect a rate which will allow them a fair measure of profit. As a result of the low rate now in effect, the companies have been steadily losing money and sought to solve the problem by reducing the commissions of their agents from 25% to

12%, and eliminating from their policies the provision for coverage of guest occupants. While it is true that allowing guest occupants of the car involved in an accident to collect claims under the liability policy encourages the filing of false and collusive claims, nevertheless, the exclusion of these persons prevents the statute from protecting a large number of those injured, and for whose benefit the law was passed.

The proponents of the Compulsory Liability Insurance Plan, Massachusetts style, would have us believe that it is panacea for the existing problem. The experience of the Massachusetts Legislature belies this contention and shows us that the true solution lies in another direction. Our Legislature wisely rejected this form of insurance.

Another alternative, which reformers have urged as a solution to the problem, is the Compulsory Compensation Insurance Plan. This method would be patterned after the present New York Workmen's Compensation Act, and would compel all car owners to contribute to a compensation fund, out of which an administrative commission would be authorized to pay all claims after deciding the merits of each. The cost of such a system would be highly prohibitive and would not be apportioned among the guilty parties. The Columbia Committee, after extensive research, has reported that the cost of such an insurance system would be approximately 161% of the cost of the Massachusetts Compulsory Insurance Law. To ask the policy holders to bear such a burden would be unfair, especially in view of the fact that only 5% of the motorists in New York State are involved in automobile accidents in any single year. We would be taxing not only the other 95% for the carelessness of the 5% who owned cars and were involved in accidents, but also for the carelessness of pedestrians and other highway users. On the average, 40% of the motor vehicle accidents involve collisions between automobiles; 45% are between automobiles and pedestrians; the remaining 15% involve collisions between automobiles and other objects on or adjacent to the highways. Therefore, in only 40% of the accident cases would the owner-operator of an automobile be himself covered by compensation. This is hardly a fair result for the price he is bound to pay for compensation to others.

Under the Compensation Plan, liability is imposed upon the owner of a car involved in an accident regardless of fault. Imposing such a burden upon a careful operator contravenes our ideas of natural justice. Such a situation would undoubtedly tend to increase, not decrease, the number of highway accidents. Fraud and collusion would become so prevalent that the rates would ultimately soar to a prohibitive level.

The plan is also limited to compensation for personal injuries. Property damage is not covered, and that would entail separate proceedings before different tribunals to ascertain the damages recoverable for personal injuries and for property damage arising out of the same accident. Litigation would be multiplied, placing an increased burden upon the taxpayer. If the Compensation Law were extended to property damage, the rate, already extremely high, would be inordinately increased. The difficulties and ex-

penses of administration and adjudication would be proportionately increased.

The proposal to administer the compensation insurance in the same manner as the New York State Workmen's Compensation Act has numerous drawbacks. The scaling of compensation based upon a percentage of earnings, is appropriate when dealing with workmen's compensation, because a man's wages are the true criterion of the extent of his financial damage caused by temporary disability. However, we tread upon different ground when we seek to impose this method of awarding compensation to victims of automobile accidents. Compensation to an injured employee is payable during the period of his disability. The compensation is not the full sum of wages he would have earned, but only a portion thereof. Consequently, the wage-earner is anxious to recuperate and return to work as soon as the disability ceases. We cannot apply this formula to victims of automobile accidents, for we lack any basis of computation in the cases of housewives, infants, invalids, and those persons whose working days are of the past. Measuring the period of disability during which such persons would be entitled to compensation is another objection to this form of insurance. For many persons who are not earning wages, compensation is pure profit, and furnishes a strong incentive for prolonging a period of seeming disability.

Another objection to this plan is the fact that, under it, an equal compensation for all persons regardless of age, capacities, earning powers and prospects, would be awarded. Such a method of distributing compensation does not meet with the approval of practical legislators.

As the method of adjusting claims for compensation by persons injured and covered by the insurance, the plan proposes substitution of a special board, created and operated as is the Workmen's Compensation Commission, for our present system of court adjudication. While it is true that the burden of distributing justice in suits concerning injuries resulting from automobile accidents would be removed from our courts and juries, such relief would be counterbalanced, insofar as the taxpayer is concerned, by the extensive litigation carried on in the new tribunal. The average number of hearings before referees under the New York Workmen's Compensation Act is over 400,000 per year. Automobile accidents resulting in personal injuries and property damage are just as numerous in this State, and the adjudication of a claim arising out of an automobile accident would be more involved and lengthy than a proceeding which decides whether an injured laborer is entitled to compensation, and if so, how much is due him. The establishment and maintenance of an administrative body capable of handling the large number of claims presented would be so expensive as to constitute an onerous burden on the public.

Perhaps the most vital feature of the plan is, that liability for compensation, if duly insured, would be exclusive. It would eliminate all other liability for compensation, for personal injury or death, caused by the operation of the motor vehicle so insured. If it were otherwise, and the injured party had the option of accepting compensation or suing for damages in the court, the existing litigation would be increased, and the const of in-

surance nessary to protect motorists against alternative liabilities would rise to an oppressive level. Finally, no compensation is allowed for pain and suffering or for loss of services; nor is compensation awarded to persons who are disabled for less than one week. All things considered, the Compulsory Compensation Insurance Plan, while appealing at first blush, loses its appeal after a close analysis of its numerous provisions.

In 1941, the Legislature, after carefully scrutinizing the various proposals which were intended to decrease the excessively high number of unsatisfied judgments, adopted the Safety Responsibility Insurance Plan, closely patterned after the syetem in effect in New Hampshire since 1937.

Article 6A §94-e of the Motor Vehicle Act is aimed directly at the careless driver and has sufficient teeth to make itself of tremendous value in keeping the careless, financially irresponsible motorist off the road. This section provides:

> Within a period of 10 to 45 days, following receipt of a report of an accident resulting in personal injury or property damage in excess of $25, the Commissioner shall forthwith suspend the license of any person operating, and the registration certificates and registration plates of any person owning a motor vehicle in any manner involved in such accident, unless and until such operator (or chauffeur) or owner, or both, shall have previously furnished or immediately furnishes sufficient security to satisfy any judgment or judgments for damages resulting from such accidents, as may be recovered against such owner, or operator (or chauffeur), or both, and shall immediately furnish and thereafter maintain proof of financial responsibility in the future. If such party is insured by liability policy or bond to the extent of $5000 because of death or injury of one person in any one accident; $10,000 because of death or injury to two or more persons in any once accident, and $1,000 because of property in any one accident, the Commissioner shall not suspend license or registration, and further security is not required.

Under the old Safety Responsibility Statute in effect in New York State prior to the passage of this amendment, the operator's license and registration certificate could be suspended by the Commissioner of Motor Vehicles only upon a verdict convicting the operator or owner of a violation of the Motor Vehicle Laws, or upon receipt of a certified copy of judgment in excess of $100, rendered against said operator or owner because of the ownership, maintenance, use or operation of a motor vehicle within the State of New York. As it has been estimated that only approximately 5% of the claims arising out of accidents in which automobiles are involved, are prosecuted to judgment, the weakness of the old statute is apparent. If the injured party did not wish to bring an action at law to recover his damages, and the party causing the damage was not convicted of a violation ofthe Motor Vehicle Law, he was permitted to retain all rights and privileges concerning the operation and ownership of the motor vehicle.

This unhappy condition has been eliminated by the provisions in the aforementioned §94-e of the new amendment, which

compels the Commissioner of Motor Vehicles to suspend the license and registration certificate of a party involved in any accident in which personal injury is caused or in which property is damaged to the extent of $25. The provision as set forth in §94-f of the amended statute makes it mandatory for the operator of any car involved in such accident to report the matter immediately in writing to the Commissioner. Failure to report is a misdemeanor and punishable by suspension of the operator's license, and registration certificate of said person. These two sections -in theory, at least- will compel careless motorists to establish their financial responsibility to the satisfaction of the Commissioner of Motor Vehicles within a period of 10 to 45 days following an accident which is serious enough to bring the statute into operation. Failure to do so will cause the offending party to be deprived of the privilege of owning and operating a motor vehicle within the confines of the State of New York. The Supreme Court of the United States in the case of Reitz v. Mealey, 314 U.S. 33, has decided in favor of th constitutionality of one of the salient provisions of the statute. Section 94-b of the amendment provides for suspension of the operator's license and registration certificate of any person, if a judgment against him for injury to person or property in excess of $25 resulting from the operation of a motor vehicle is not paid within 15 days. The suspension is to continue for three years, unless judgment was satisfied or discharged within that period, by discharge in bankruptcy. Mr. Justice Roberts in delivering the opinion of the court stated, "The Statute, not considering amendments, is not obnoxious to the due process clause of the Fourteenth Amendment. The use of the public highways by motor vehicles, with its consequent dangers renders the reasonableness and necessity of regulation apparent. The universal practice is to register ownership of the autos and to license their drivers. Any appropriate means adopted by the State to insure competence and care on the part of its licensees, and to protect others using the highway is consonant with due process. Some states require insurance or its equivalent as a condition of the issue of a license. New York, instead, chose to obtain the same end by providing for the revocation or suspension of a license if the holder is adjudged of negligent driving."

The provision in §94-b declaring that a discharge in bankruptcy does not interfere with the operation of the statute, is declared by some objectors to be in contravention of §17 of the Bankruptcy Act. The Federal District Court for the Northern Distric of New York has evaded the deciding of their contention in Matter of Perkins, 3 Fed. Supp. 697. In that case, Judge Cooper agreed that the Section denied to the bankrupt the full effect upon such judgment of a discharge in bankruptcy, and perpetually enjoined the judgment creditor from filing a certified copy of the judgment against the bankrupt, with the Commissioner of Motor Vehicles of the State of New York. However, the Court declined to decide the validit of the provision in respect to State officials.

In Munz v. Harnett, 6 Fed. Supp.158, the District Court for the Southern District of New York refused to adopt the holding in the Perkins case and held that the provision of §94-b did not contravene §17 of the Bankruptcy Act, because the Legislature did not say that the judgment creditor may compel the debtor to pay in spite of judgment of discharge in bankruptcy. In Reitz v. Mealey

the Court dodged the issue and refused to consider the validity of the provision, putting it within the power of a judgment creditor to lift the suspension of license and registration and to restore such suspension, as the creditor in this case did not seek to exercize such power. At present, this question must remain undecided, but regardless of the validity of the foregoing provision, the other vital provisions of the Statute would remain unaffected.

Paragraph D of §94-h provides that the car involved in any such accident shall not be registered in the name of any person until the owner thereof has furnished proof of his financial responsibility and has satisfied the judgment recovered against him as a result of the accident. This provision affords further protection to the injured party, as the owner of any such vehicle can not transfer the title to the automobile to any other party. Should the injured party bring suit and obtain judgment, he is assured of having a lien upon the car, and may dispose of it. He would thereby recover at least a partial satisfaction of his judgment. The only party to whom title can be transferred is a creditor obtaining a judgment for damages which arose out of the transaction for which the suspension was imposed.

In a sense, the successful application of this Act is largely dependent upon the wholehearted cooperation of the motorists who make use of our highways. There are many motorists who dislike to report accidents in which they are involved, even though they be absolutely blameless. If a financially irresponsible operator, through his own negligence, caused property damage to such a motorist, he might well be able to effect a cash settlement immediately following the accident and persuade the innocent party to refrain from reporting the damage. In such case, although the person whose property was damaged has received compensation for it, the guilty party against whom the statute is aimed may still continue to operate his car upon the highways without being compelled to establish his future financial responsibility. Also, if a party injured through the negligence of another motorist fails to report the accident, but later brings suit and recovers a judgment against the party at fault, he may again defeat the purpose of the Statute by failing to demand that the clerk of the court in which judgment was rendered, send a certified copy of said judgment to the Commissioner of Motor Vehicles if said judgment is not satisfied or unless arrangements are made for its satisfaction within 15 days.

There are several small points which would seem to require correction if the statute is to operate smoothly. Under ¶A of §94-e the Commissioner of Motor Vehicles must decide an important question of fact: "Who is the party aggrieved and who is the party at fault?" On the basis of this determination depends the suspension of the license and the registration certificate. If the Commissioner decides that one party is at fault, he may compel him to give and thereafter maintain proof of his financial responsibility, even though such person has recovered a judgment in an action at law against the party whom the Commissioner decided was the party aggrieved. (This is declared to be a recognition of the divergent methods of fact-finding employed by administrative tribunals and courts of law, but seems hardly to conform to the layman's conception of justice.)

The Statute is aimed at those who have caused and are most likely to cause accidents in the future - not at innocent persons. It does not seem a just and reasonable classification if we suspend the operator's license and the registration certificate of an innocent party who happens to be the victim of another's negligence. In the case of Frost v. Railroad Commission of California, 281 U. S. 583, decided in 1926, the United States Supreme Court held that an unreasonable classification will not be permitted, even though the use of the highways is a privilege which the State could withhold.

The unpaid-judgment provisions, as carried over from the old Motor Vehicles Statute, seem in most cases, a mere superfluity. They would apply in only two cases: 1. Where a party suffers judgment and fails to pay, the accident never having been reported, 2. When a party whom the Commissioner has adjudged not to be at fault, suffers judgment and does not pay. Prompt payment avoids application of the unpaid judgment provisions, but does not prevent the application of the accident provisions. Except in the case of a party adjudged innocent by the Commissioner, although the judgment was rendered against him in a court of law, this unfortunate variance should be corrected.

The new §94-c permits the Commissioner to suspend the license and registration certificate upon any reasonable ground. The wording of this provision seems too vague. When dealing with a subject such as the financial responsibility of car owners the extent to which the Commissioner may exercise his discretion should be specified. It is to be hoped that the word "reasonable" will not be interpreted as giving the Commissioner the power to exercise an uncontrolled discretion.

New Hampshire has expressed satisfaction with the results which followed the introduction and continued application of this type of regulation. The number of motor vehicles owned and operated in New York State is, of course, many times greater than the number registered in our sister State of New Hampshire. Whether this great discrepancy in numbers will cause the plan to be less effective in this State is problematical.

Unfortunately, the legislation went into effect at a time when the privately owned cars in New York were being steadily forced into temporary disuse because of the National emergency. It does not seem probable that the full effect of the Amendment to our Motor Vehicle Law will be appreciated until the war has ended.

ANDREW MICHAEL PINCKNEY

A BANK'S LIABILITY FOR A TRUSTEE'S DIVERSION OF ASSETS

The question in the case of Grace v. Corn Exchange Bank, 287 N.Y. 94, concerns the liability of the Bank for the diversion, by the trustee, of the assets of a trust account in one of its branches

The facts are virtually undisputed. In June, 1930, Chessman Kittredge was appointed as successor trustee under the will of David Fox, the original trustee having been declared incompetent. The assets which he received were very large. From time to time he sold assets, and usually deposited the proceeds in an account which he, as trustee, opened in the 86th Street Branch of the defendant Bank. When he died in 1936 few of the assets remained in the estate He had wasted or appropriated to his own use almost the entire fund.

Prior to his appointment as trustee, Kittredge had applied to Arthur L. Sherer, a vice-president of defendant Bank, for a loan to Tompkins & Bevers, Inc. Kittredge was treasurer of this corporation, and, with one Paul Randall, controlled its affairs and owned its stock. The loan was made on the note of the corporation, endorsed by Kittredge and Randall, and secured by collateral. Kittredge also borrowed money from the bank on his personal note, well secured by marketable collateral. At the time of the application he opened in the 86th Street Branch of the Bank a personal account and an account for the corporation. Kittredge was at the time well regarded in the community. His father-in-law was a friend of Sherer Sherer had no reason to question his honesty, and the loans to him and to his corporation seemed advantageous to the bank. The trust account which he afterward opened seemed likewise a very desirable account for the bank to obtain. Of the checks which Kittredge drew on the trust account, almost two-thirds were payable either to his own order, or endorsed by him as trustee to his own order, and deposited in his personal account.

The first of such checks was drawn on September 9, 1930, and was deposited in his individual account at a time when that account, except for this deposit, would have been overdrawn. Shortly thereafter he drew two other checks to his individual order, the proceeds being used for his personal benefit.

On November 13th, Kittredge drew money out of the trust account to his own order, endorsing the check for deposit in his individual account. The check was given to another branch of defendant Bank and the next day credited to his individual account in the 86th Street Branch, in which account there was but a very small balance at the time. On November 14th, Kittredge drew a check on his individual account, payable to Tompkins & Bevers, Inc., for $5,000, and this was deposited in the Corporation's account. Thereupon a check was drawn on the corporate account for this sum, payable to the defendant. The corporate indebtedness was thereby reduced, the reduction being accomplished by routine bookkeeping methods.

Kittredge, having been informed by the Bank that the collateral on his personal indebtedness had decreased in value, he

drew, on September 21, 1931, one of his typical checks on the trust account, for $5,000, and deposited it in his individual account, bringing his balance to $6,421.41. The following day he drew a check for $5,000 on his individual account, with the defendant Bank as payee. The Bank received the check, debited the amount thereof against the individual account, and credited the proceeds towards the reduction of Kittredge's personal note indebtedness. The diversion of the trust funds continued until the time of Kittredge's death.

The plaintiffs as successor trustees seek to recover damages from the Bank for injury to the estate by virtue of Kittredge's wrongful conduct on the ground that the Bank joined with him in misappropriating the assets of the estate. The case came up before Lockwood, J., at Special Term of the Supreme Court in Kings County on May 11, 1939. It was there held - the Justice following the rule laid down in Bischoff v. Yorkville Bank, 218 N.Y. 106,- that a bank is liable for diversion of trust funds when it participates in such diversion either by acquiring an advantage or benefit directly through or from the diversion, or by joining in a diversion in which it is not interested, with actual notice or knowledge that the diversion was intended or was being executed and thereby becoming privy to it; that the Bank participated in the diversion when it received the $5,000 check of Tompkins & Bevers Inc., since the Bank received money which Kittredge had diverted from the trust account, and the Bank was therefore liable for all subsequent diversions of the trust money.

An appeal was taken and the Appellate Division, Second Department, reversed, Adel and Close, JJ., dissenting in separate opinions. The theory on which the majority of the court proceeded was, that due to the immense volume of daily transactions a division of labor among the subordinates handling the details was necessary, so that when a check was drawn by the trustee and deposited in his personal account the crediting group paid no attention to the name of the drawer, and the debiting division gave no heed to the name of the payee, and thus the trust funds found their way into the personal account without knowledge of anyone in authority, therefore the misuse of the trust fund through the personal account could not be known. The Bank therefore had no actual knowledge of the misuse of trust funds, even though the combined knowledge of its numerous agents constituted notice. The court held the bank liable only for those moneys which the bank received - those which had been diverted from the trust account for the payment of the Corporation's indebtedness and Kittredge's to the Bank. The court further held that their decision was not in conflict with Bischoff v. Yorkville Bank, supra.

Adel, J., in an able dissenting opinion held the Bank to have been informed of the diversion when on September 22, 1931, it took Kittredge's check for his personal indebtedness to it, the money with which to meet it having been transferred the day before from the trust account.

Close, J., in his dissenting opinion charged the Bank with notice of the diversion of the trust funds as of September 11,

1930, when Kittredge transferred by check $5,000 of the trust funds to his personal account, since the Bank then knew the trustee was commingling trust funds with his personal funds.

Upon appeal the Court of Appeals reversed. Chief Judge Lehman wrote the opinion of the court, finding the defendant bank liable for all diversions subsequent to September 22, 1931, when the Bank received trust moneys in reduction of Kittredge's personal indebtedness to it. The learned judge, after stating the facts, made a general statement as to a bank's liability in such a case, namely, that the bank was under no duty to exercise vigilance to protect the trust estate from possible embezzlement by the trustee. The only obligation it incurred by accepting the trust account was to pay out the moneys deposited in accordance with the directions of the trustee. "To establish joint liability of the bank for the derelictions of the trustee, the plaintiffs must prove that the bank gave to the wrongdoer such assistance as would make the bank a participant in the wrong. Proof that the bank failed in care is insufficient." (p.102) The court, applying the rule of the Bischoff case which it cites, states that though the bank was in fact aiding the trustee in embezzlement when pursuant to his orders it debited the trust accountand credited the personal account with the amount of the checks drawn by him to his own order then honored his individual checks by means of which the theft was consummated, it still was justified in following the trustee's directions unless it knew the trustee was engaged in embezzling the trust funds by withdrawal of the trust money. The question is whether the bank may be heard to say it did not know of the diversions. Until a bank has notice to the contrary, the presumption is that the trustee is lawfully applying the trust funds.

The court took cognizance of the fact that the Bank's operations were conducted by numerous employees so that it might in fact have no notice of wrongdoing by a depositor acting in a fiduciary capacity even though it had constructive knowledge due to the individual knowledge of all its employees. It was stated that a bank under some circumstances, might be charged with such constructive notice where a depositor asserts that a bank is liable for dereliction of a duty owing to the depositor, or where the bank seeks to retain a benefit it has innocently received from a wrongdoer at the expense of another innocent party. The court did not consider such question, i.e., where there is no liability unless there has been guilty participation in the trustee's theft.

In discussing the proceedings of September, 1930, it was declared that the Bank did not become a guilty participant in the trustee's diversion of trust funds. It is true that the records of the Bank showed at least a temporary technical overdraft in the trustee's personal account, which was promptly covered by the deposit of a check drawn on the trust account; and if the Bank had caused an audit to be made of the personal account of the trustee and of the trust account it would have discovered that the trustee had diverted trust moneys for the payment of an insignificant overdraft, but even though an overdraft constitutes a debt to the bank, small overdrafts promptly covered by the depositor are in practice often disregarded by banks. The Bank treated this overdraft and later insignificant

overdrafts which were promptly covered by new deposits, as routine matters, and the court declared it was justified in so doing, following what was said in Bischoff v. Yorkville Bank, supra. Likewise it was justified in deducting from the personal account interest on personal loans in accordance with its usual practice and was not called upon to investigate on each occasion whether or not the personal account contained at that time only trust funds. The learned Judge had this to say, however: "Nonetheless, where a bank accepts payment of any indebtedness with knowledge that the debtor is wrongfully using moneys which do not belong to him, the bank becomes a participant in the debtor's wrongful act, and what the court said and decided in Bischoff v. Yorkville Bank (supra) leads to the inevitable conclusion that elemental principles of honesty and good faith are violated where a bank, with knowledge that a borrower is transferring to his personal account moneys which belong not to him but to a trust estate, accepts payment of the personal indebtedness of the trustee from moneys in the personal account, though inquiry by the bank would show that the only moneys in the personal account were moneys which did not belong to the debtor. If the bank chooses to ignore completely the facts which indicate that the debtor is using moneys which may not belong to him, and accepts payment carelessly whether or not the moneys paid belong to him, it becomes morally and legally a participant in the debtor's wrong." (p. 105)

The Bank claims it acted honestly and properly; that the mere notice to a clerk that there had been a transfer of moneys from the trust fund to the personal fund wasn't sufficient to charge one of its officers with knowledge. In answer to this the court makes the following statement: "Though the bank cannot fairly be charged with guilty participation in a crime upon the fiction of constructive, composite knowledge of everyfact of which any employee had notice, we think it plain that here it must be charged with notice that the trustee had placed in his personal account moneys belonging to the trust estate. We need not decide whether notice that the trustee had done so once would be sufficient. Here, there is more than that. Four such transfers had been made on or before November 13, 1930, and more than twenty, in addition, before September, 1931. Each such transfer was notice that the depositor, heavily indebted to the bank, was acting in a manner that is 'unwise and hazardous.'(Bischoff v. Yorkville Bank, supra. p. 110.)" (p.106

The opinion continues discussing this point with the statement that, to require a clerk receiving such notice to report it should not unduly hamper the transaction of business of the bank. The requirement should be similar to that where a corporate officer authorized to draw checks on a corporate account draws a check to his own order, in which case the clerk is required to report the fact. The Bank therefore is charged with the knowledge that the trustee was withdrawing from the trust account moneys belonging to the estate and placing them in his individual account. On the date when it knowingly aided him in withdrawing trust moneys from the personal account in order to pay a personal debt of the trustee to the Bank, the Bank became liable as a joint wrongdoer.

This knowledge was not acquired in its receiving trust moneys for the debt of Tompkins & Bevers, Inc., however; the trans-

fer was too roundabout to charge the bank with notice of the diversion, and this is so even though it received the benefits of the diversion. It is liable to the plaintiffs in such amount, of course but the transaction did not make the Bank a participant in the trustee's wrongdoing so as to make the Bank responsible to the plaintiffs for all subsequent diversions.

In September, 1931, however, the situation was different. The Bank then had notice that Kittredge had transferred large sums from the trust account to his personal account, and yet it accepted his order to apply moneys in the personal account to the payment of a personal indebtedness. The most cursory examination would have shown overdrafts in the personal account covered by checks drawn on the trust account, and a more detailed survey would have shown the personal account composed entirely of moneys drawn from the trust account. "Neither a large bank nor a small bank may urge that it is ignorant of facts clearly disclosed in the transactions of its customers with the bank - disclosed, too without the need of artificial synthesis of notice of separated operations; nor may a bank close its eyes to the clear implications of such facts. By ignoring these facts and their necessary implications, the bank became a guilty participant in the trustee's embezzlement of trust funds deposited in the trust account in the bank and from that date it became liable as a joint wrongdoer for all moneys which the trustee embezzled." (p. 107)

Judge Lehman concludes by saying that the court held to the same effect in the Bischoff case, and though that has been criticized as placing an undue burden on the bank, 'experience has failed to show that a bank is subjected to an undue burden by the ruling that it may not ignore clear indications that a debtor is paying a personal indebtedness out of funds which do not belong to him." (p. 107)

It may well be that this opinion does no more than reaffirm the principles laid down in the Bischoff case as to the liability of the bank in the case of diversions by the trustee. It would be difficult to see how a case could be referred to more often to substantiate a decision. It would seem to this writer, however, that there are sentences in the opinion which might well afford a loophole through which the Bank might escape liability in a subsequent action in which the facts were but slightly divergent from those of this case. What does the learned judge mean by this statement? "Though of course the bank cannot fairly be charged with guilty participation in a crime upon the fiction of a constructive, composite knowledge of every fact of which any employee had notice, we think it plain that here it must be charged with notice that the trustee had placed in his personal account moneys belonging to the trust estate. We need not decide whether notice that the trustee has done so once would be sufficient. Here there is more than that. (p. 106) [Underscoring is the writer's.] This may mean no more than that the court applying the principles of the Bischoff case to the circumstances here involved find the liability of the bank clearly established. It might also be inferred from this paragraph, however, that the court wishes to limit itself strictly to the facts

of the present case and carefully refrains from using broader terms so that in a subsequent case of the same type it may be free to come to a different conclusion.

The concluding paragraph of the opinion could likewise be called ambiguous. "Experience has failed to show that a bank is subjected to an undue burden by the ruling that it may not ignore clear indications that a debtor is paying a personal indebtedness out of funds which do not belong to him." (p.107) [Underscorings are the writer's.] Does this mean that in the future the court may come to the conclusion that it is imposing too heavy a burden on the bank? Does the court merely say as of this time, it appears that no undue hardship is imposed, or is it saying that it is only just that a bank should be so liable? What do the words "clear indications" mean? Without overruling its present decision the court in a subsequent action might say there were no clear indications of the defalcations by the trustee, therefore the bank is not liable.

It certainly cannot be said in the face of the conflicting opinions of the worthy Judges in this case that the law in regard to a bank's liability for diversions by a trustee was so far settled by the Bischoff case as to leave no room for doubt, for here, with the same premise and the same rules applying, different conclusions were possible. Without doubt the principles were correctly applied by the Court of Appeals. If the decision of the Appellate Division had been followed, the established rules of law would in practical effect have been rendered meaningless. Nevertheless, it is possible in the opinion of this writer, to construe the opinion of our highest court in such way as greatly to constrict the principles promulgated by the court in Bischoff v. Yorkville Bank. Whether the court will see fit to narrow these rules, can be ascertained only through subsequent decisions. By the opinion in this case, it has at least left itself free to do so if it desires. To outward appearances the law as to the bank's liability for a trustee's derelictions is still the same, and that may indeed be the case, but Grace v. Corn Exchange Bank at least gives rise to speculations whether the principles of law enunciated in the Bischoff case may not at a subsequent date be somewhat modified.

DONALD GREGORY HATT

CLEMENCY UNDER THE FELONY MURDER RULE

In 1937 the Legislature of the State of New York enacted a brief but troublesome bit of legislation. It is said to be troublesome, although its meaning seems perfectly clear. The full legal import involves life or death, depending upon the interpretation of just a few words, and the courts have been hesitant in deciding how it should be construed, despite the fact that opportunities have been presented. The Court of Appeals seems to have preferred to await the time when the question would be squarely enough presented to call for a solution. The case of People v. Hicks, 287 N.Y. 165, presented such a question.

This statute, now known as §1045-a of the Penal Law (added by Chapter 67 of the Laws of 1937), is included in Article 94 of the aforesaid Penal Law, entitled "Homicide", and reads:

> A jury finding a person guilty of murder in the first degree, as defined by Subd. 2 of §1044 (the felony murder rule), may, as a part of its verdict, recommend that the defendant be imprisoned for the term of his natural life. Upon such recommendation, the court may sentence the defendant for the term of his natural life.

By the same chapter, the Legislature amended Penal Law §1045, also, by adding after the words "Murder in the first degree is punishable by death" the proviso "unless the jury recommends life imprisonment, as provided by §1045-a."

The question which provoked so much uncertainty is, whether, if the jury finds a defendant guilty of a felony murder and then all twelve jurors cannot agree as to whether they should recommend leniency (life imprisonment), rather than the death penalty, they could and should be permitted to bring in a verdict of murder in the first degree. Certain phases of this statute have been determined, such as, that the recommendation of life imprisonment was not mere surplusage, People v. Ray, 172 Misc. 1004, aff'd 259 A.D. 1065, appeal dismissed 282 N.Y.680; that the life sentence is mandatory as to the sentence following the recommendation, (People v. DeRenna, 166 Misc. 582); that the jury's recommendation that the accused be given a life sentence for felony murder would not be mandatory on the trial court, (People v. Ertel, 283 N.Y. 519); That immaturity and youth of a 20-year-old defendant is ample basis for the exercise of the court's discretion, (People v. Ray, supra). Yet, up to the case of People v. Hicks, supra, the courts had not directly decided whether the jury, finding the defendant guilty of murder first degree and disagreeing as to the question of recommendation of a life sentence, could still bring in a murder first verdict.

Edward Hicks, the defendant, was indicted jointly with his brother, Miles Hicks, for the murder of Max Graboff, and the two brothers were tried together. The indictment was in the common law form and the jury was instructed that it might find the defendants guilty of murder in the first degree if it found that defendant

killed their victim either from a premeditated and deliberate design to effect his death, or while engaged in the commission of another felony. The jury returned a verdict of guilty as charged as to Edward, the appellant; and as to Miles Hicks, guilty as charged but with a recommendation of the life sentence.

At the time of the homicide, Edward was 21 years old, married, and the father of two children; Miles was 16 years old and lived with Edward and his family. Work was not steady at the garage where both brothers were employed, and the need of money became a serious problem, with rent and grocery bills to be paid. Graboff owned a small store, and the defendants noted that he always carried a well filled wallet. They decided to, and did, rob him of some of this much-coveted money. In doing so, Edward hit the victim over the head with a steel axle shaft, which fractured deceased's skull; and, to make certain that their victim would never be able to act as accuser, they slit his throat with a knife brought along for such a purpose. The loot turned out to be $5.25, together with papers of no value to the defendants.

The defendants did not seriously contradict the story of the crime. Instead, they claimed that on the morning of the crime they had drunk what Judge Lehman called "some wretched stuff which is, it is said, known as 'King Kong' whiskey", and that they do not know what they did thereafter. But the question of intoxication was not a point on the appeal. Rather, defendant attacked the charge to the jury.

The trial judge, Leibowitz,J., said to the jury: "There cannot be any recommendation unless the twelve of you agree. But if you all are agreed that the defendant is guilty, it is nevertheless your duty to report that verdict to the court. Is that clear? Even though you cannot agree on the recommendation. In other words, you cannot use the recommendation as bait, in determining the guilt or innocence of the defendant. The recommendation has nothing to do with that determination. You must first determine whether or not the defendant is guilty of murder in the first degree. Having once determined that (unless you desire to change your mind on the evidence -- which you are at liberty to do before you report your verdict) that is something like finished business. To use a popular expression, you "lay aside that", and then if you are all agreed that it is under the felony theory of murder, you pass to a consideration of the recommendation. Then if you are all unanimous that there should be a recommendation, it is your duty to bring in the recommendation; but if you are not unanimous on that proposition, it is nevertheless your duty to bring in the verdict of guilty of murder in the first degree, even though you cannot agree on the other. Is that plain?"

Counsel for the defendant excepted to these instructions and asked the court further to instruct the jury, but the learned trial judge reiterated the same charge, and refused to accede to counsel's plea for a correct instruction as to the law. Thus the question was put squarely before the State's highest tribunal, the Court of Appeals, for its final and ultimate determination.

Lehman, C.J., writing for the majority (Finch, J., alone dissenting), after quoting §§1045-a and the amendment to §1045 as set forth above, included the message from the Governor to the Legislature at the time the measure was enacted, which message indicated clearly the legislative purpose and intent.

Governor Lehman wrote: "While discussing the anti-crime wave program, I wish to bring once more to your attention a somewhat related matter which has long been on my mind. That is the necessity of changing the Penal Law on felony murder. Under the existing law, in the event that a murder occurs during the commission of any felony, all those involved are held equally responsible and if found guilty may be sentenced to death. The jury has absolutely no discretion. The verdict must either be acquittal or murder in the first degree for which the penalty is death. In other cases of murder, the jury has the right of bringing in verdicts of murder first degree, murder second degree, or manslaughter. As the result of the limitation placed on the jury in felony murder cases, the jury is faced with the choice of condemning to death a man for whom it would like to show some clemency, or, on the other hand, of letting him go completely unpunished.

"I believe that the sentence for felony murder should continue to be death, the same as for premeditated murder. However, I would empower the jury to accompany any verdict of guilty with a recommendation of executive clemency in which case the sentence shal not be death but life imprisonment. My reasons for this recommendation are two-fold. The first is that it will make it easier for the jury to bring in verdicts of guilty in felony murder cases. In the second place, it will permit the jury to fit its verdict to what it may consider to be the varying degrees of moral guilt of the persons involved in the same crime. I strongly recommend this change."

This is the purpose the Legislature had in mind when Chapter 67 of the Laws of 1937 was added; this is their intent: To avoid the influence of the punishment to be inflicted on the guilty defendant which the jury is bound to have in mind in felony murder cases, where the homicide is not of the premeditated and deliberate kind, but as incident to and in connection with some other felony. The other felony is often the object of the criminal act and the homicide often is not only committed in the heat of desperation but in many instances, by accident - as in the fight over possession of a weapon, or when an otherwise simple assault induces heart-failure in the victim.

Now, the jury is not compelled to either acquit a man or condemn to death one for whom they would like to show some clemency. They have another choice. They may either acquit and let him go free; or, bring in a verdict of guilty, without recommendation for the life sentence as part of the verdict; or, the jury may in a proper case "fit its verdict to the varying degrees of moral guilt" by recommending, as a part of its verdict when finding the defendant guilty of murder in the first degree, that the defendant be imprisoned for life.

It is obvious that a finding of guilt by a jury has no legal consequences unless it is embodied in a verdict; it is also

obvious that the Legislature has expressly empowered a jury finding a defendant guilty to make a recommendation of life imprisonment a part of its verdict. The statute does not provide expressly, nor by fair implication, that a jury so finding shall render a verdict of "guilty" without a recommendation of life imprisonment where the jurors have not agreed upon such a verdict. "Until the jury has reached agreement upon every part of the verdict it has not agreed upon a verdict at all." By providing that a jury "finding a person guilty of murder in the first degree" (in cases of felony murder) "may, as a part of its verdict, recommend that the defendant be imprisoned for the term of his natural life", the Legislature has plainly said that the jury must determine, (1) Whether accused is guilty of the crime charged; (2) Whether the sentence shall be death or whether the trial judge may pronounce a sentence of life imprisonment. Both must be determined by the jury, and the jury's answer to both questions must be embodied in the verdict. Each juror must agree upon one verdict in all its parts, and until they all have agreed on every part of the verdict, they have not agreed on any verdict.

The trial court was, therefore, in error when by its charge it stated that the jury must first agree on a verdict of guilty, which would then have the effect of condemning the accused to death, and then may recommend life imprisonment as part of the verdict only if all the jurors agree to such clemency. "That", said Judge Lehman, "is not justified by the language of the statute and would in large measure defeat its plain purpose." Under that erroneous construction of the trial court a jury still must face the choice of condemning the defendant to death or letting him go free, unless all twelve jurors thereafter agree upon a recommendation of clemency. Such construction ignores the fact that the choice whether a recommendation of life imprisonment should or should not be a part of the verdict, is left to the jury, and the verdict is incomplete until all have agreed on all the parts of the one verdict. 'That construction", concludes Judge Lehman, "assumes that the Legislature has confided to a single juror the choice of life or death for an accused."

Therefore it is the law of New York that the jury must unanimously agree that the defendant is guilty of murder in the first degree, according to the doctrine of felony murders, and that either life imprisonment is recommended or is not recommended; that both of these questions are essential to their rendering a verdict; that both questions must be agreed upon by all the jurors before they can bring in a verdict, and if they cannot agree unanimously on both these questions, they have not arrived at any verdict at all.

The strange part of this case is not the result itself, which is both logical and desirable in view of the purpose of the Act, but in the fact that Samuel Leibowitz, who, as County Judge of Kings County gave the erroneous charge at the trial. For in People v. Gatti, 279 N.Y. 681, as counsel for the defense, he took a position that is similar to the result of Judge Lehman's opinion. In that case, however, the same question - though it did arise at the trial as a result of an obscure charge of the trial judge- was clarified by a further charge and was not raised on the appeal, the decision being based on other grounds.

JOSEPH ANTHONY FISCHETTE.

LIABILITY OF A MUNICIPAL CORPORATION FOR A WILLFUL TORT OF ITS EMPLOYEE

A theory of the law which causes trouble whenever attempts are made to apply it to a given set of facts is that of a principal's liability for the torts of an employee. Osipoff v. City of New York, 286 N.Y. 422, once again presented this problem to the Court of Appeals. The well recognized rule in this State is very clear in itself. A principal is liable for the torts of an employee when the employee is acting in the course of his employment and in furtherance of his principal's work. In the case of a willful tortious injury to a third party, committed by an employee at a time when the employee was engaged in the principal's work, it is always a serious question of fact whether said employee stepped beyond the scope of his employment; whether such injury may reasonably be said to have been committed in the course of and in furtherance of the employee's work. Each case must depend upon its own peculiar circumstances, and thus it is impossible to set up any rigid rules for determining the principal's liability. This is clearly illustrated by the Osipoff case, in which the members of the Court of Appeals split four-to-three.

Carl Osipoff, the plaintiff, was the owner and lessor of a freshly painted truck, of which he had taken delivery on the day in question. It had canvas-covered racks. Plaintiff, accompanied by his seven-year-old son, drove his truck down a street in Brooklyn after passing an intersecting avenue at which there were no warning notices or barriers indicating that there were any obstructions to be encountered. Between the avenues he came upon the following situation: There was a parked car, not owned by the City, which blocked the right side of the street; alongside that there was a city truck; to the left there was a pile of broken asphalt which was being loaded upon the city truck. There remained upon the left, for vehicular traffic, a narrow portion of the street, upon which had been newly laid a strip of asphalt, above which there were overhanging branches of trees which were likely to scratch the top and side of plaintiff's truck and to rip and tear the canvas upon the racks.

The method of the City in doing the street repair work is of some importance. There were two gangs at work. The first gang, of which the individual defendant, Sisto, was in charge, cut out the asphalt, where repair was needed, and piled it to one side. The second gang then laid the asphalt. The first then returned and loaded a city truck with the broken pieces of asphalt and they were carted away. It was more or less a continuous, synchronized method of work performance. As the plaintiff approached, the work of loading the debris was in process.

When the plaintiff, after blowing his horn, was directed to proceed over the newly laid asphalt at the extreme left, he descended from his truck and after inspection told Sisto and another employee who had approached that he could not go under the trees without tearing his canvas and that that would be "at his own expense." Thereupon, the employee with Sisto attempted to enter the truck for the purpose of driving it himself, and when the plain-

tiff pushed him away, that employee struck plaintiff with his hand and Sisto struck plaintiff with his shovel, inflicting the serious injuries of which complaint is made.

The court left to the jury the question whether "the act of the defendant Sisto in striking the plaintiff was committed in connection with and in course of the work then being performed by the city of New York and with a view to the furtherance of that work", and instructed the jury that, if it so found, the City was responsible even though the act was wanton, willful and unauthorized by the City. The court further charged that, if the jury found that Sisto's act was entirely without the scope of his employment, no verdict could be found against the city.

The plaintiff had a jury verdict. The Appellate Division reversed the judgment entered thereon and dismissed the complaint against the City of New York upon the law but affirmed the judgment as against the individual defendant. The reversal and dismissal were upon the ground that the municipality was not responsible in damages for the assault by its employee as it was not committed within the scope of his authority.

Judge Conway wrote the majority opinion for the Court of Appeals, which reversed the judgment of the Appellate Division and affirmed the holding of the Trial Term, that Sisto was acting within the scope of his employment. Rippey, Lewis, and Desmond, J.J., concurred. Judge Loughran dissented with opinion, in which Lehman, Ch. J., and Finch, J., concurred.

The reasoning applied by the majority of the court is completely and concisely contained in the first paragraph of Judge Conway's holding:

> What, then, was the apparent scope of Sisto's authority due to his employment by the city? Clearly it was to protect his master's property, to direct the execution of the tasks assigned so that a minimum of time would be consumed and to regulate traffic in and about that portion of the public highway of which he and those under him had taken possession. It will be remembered that there were no detour or warning signs at the intersection of street and avenue which the plaintiff had last passed. Certainly it was within Sisto's authority to so direct traffic in the area indicated that newly performed work would not be damaged and so that there would be no interference with the men while doing their work. He had authority to direct traffic to the right side of the street, to the middle of it or to the left side. That was exactly what he undertook to do. He was in command of a portion of the public highway which his master was obligated to keep reasonably safe for traffic and upon which the master was obligated to protect the person of the traveler from harm. Sisto was clothed with the power to direct plaintiff to proceed upon the extreme left of the street and to compel by all lawful means a compliance with that direction.

In the opinion the words "public highway" were italicized, showing that the majority placed great weight upon the place where

the attack occurred. Inasmuch as it was defendant's duty to care for such highway, the court felt that any act of an employee in exercising the duty of care was within the scope of his employment; and that an attempt to forde the plaintiff to obey, even though done in a manner not authorized, was an act done in furtherance of the work. In short, the defendant Sisto had authority to direct traffic; he had authority to do acts of a certain kind. The master is chargeable only for acts of an authorized class which in the particular instance are wrongful by reason of excess or mistake on the servant's part. This conclusion naturally led the court to hold that Sisto did not step beyond the bounds of his employment when he assaulted the plaintiff.

The Court cited with approval the following statement from Moore v. Metropolitan R. Co., 8 Q.B. 36, 39: "Where there is a necessity to have a person on the spot to act on an emergency, and to determine whether certain things shall or shall not be done, the fact that there is a person on the spot who is acting as if he had express authority, is prima facie evidence that he had authority."

The defendant urged that the assault was the result of a controversy which had nothing to do with the protection of city property and had no real relation to the work being performed. The court answered such argument as follows: "It is clear that there was presented here, at the very least, an issue of fact as to whether or not Sisto and his companion, when they approached the truck and attempted to take possession of it, intended to drive over the asphalt strip at the extreme left of the street, even though the truck would be damaged, in order that they might not be compelled to move the City's truck and thus lose time in doing the repair work. Here the employees of the municipality had taken physical possession of the public highway upon which the plaintiff was properly proceeding. He was obliged to proceed upon a public highway if he were to proceed at all." Again the majority italicized the words "public highway."

That the act was willful does not preclude recovery. If the act was done within the scope of the employment, while the employee was engaged in his master's business, and done with a view to the furtherance of that business, the master will be responsible, even though the act be willful. This principle of law is well settled. The trouble arises when it is necessary to determine whether an act is so willful that it could not possibly be within the scope of the employment. In the case under discussion the court brought the tort within the possible scope of Sisto's duties, and thus it became immaterial that it was willful.

There was evidence presented from which a jury could find that the act complained of was within the scope of the actor's employment, done while engaged in his master's business and in "furtherance of that business and the master's interests."

The dissenting opinion by Loughran, J., was very brief: "On these facts, I think Sisto's attack upon the plaintiff cannot

reasonably be connected with anything but Sisto's own bad temper. For the sake of argument, I grant that Sisto and his fellow-workmen had undertaken concerted action to conserve the resources of the employer. Even on that large assumption, I think no jury could reasonably find that Sisto's wholly irrational behavior was within the scope of his employment." Lehman, Ch.J., and Finch, J., concurred.

The writer can do no more than set forth the general principle of law, and show its application to the facts in this case. Any critical comment would be useless, for such would simply be one person's reaction to the given facts, and of course others might very well draw the opposite inference. The Court of Appeals split four-to-three, but the law is settled, as decided by the majority. No doubt many lawyers will support the contention of the minority. However, I believe that the great majority of laymen feel that the decision is the only just one under the circumstances. Morally there can be no doubt of the result, for an innocent party has been compensated for a wrong done to him. Legally, it is a very close case. Osipoff v. City of New York is an excellent example of the difficulties encountered in applying well settled principles of law to a given set statement of facts.

JAY COX O'BRIEN

N O T E S

MATTER OF LINDEWALL, 287 N.Y. 347:- The question before the court in this case involves the right of a spouse sentenced to life imprisonment to take an elective share in his deceased wife's estate under the Decedent Estate Law §83.

On June 27, 1937, the decedent, Marguerite Lindewall, married John Paul Bathelt, Jr., in the State of New York and they lived in New York until 1938. Decedent had always been and continued until her death on March 6, 1939, to be a resident of and domiciled in this State. In June, 1938, her husband was indicted for murder in the first degree, committed in the State of Massachusetts. He pleaded guilty to murder in the second degree and was sentenced to imprisonment for life. He is still confined under that sentence.

In November, 1938, the decedent made a will in which she set up two trusts. She divided her estate into two equal shares, directed that the income from the one share be paid to a friend for life, principal to be paid to a charitable instution on the death of the friend. The income from the second share was to be paid as follows: $15 monthly to Bathelt, whom she described as her former husband, during his life, or so long as he should be confined in prison, balance of income to a charitable institution; upon his death or release from prison, principal to the charity.

Bathelt appeared by counsel and filed an answer asserting a statutory interest in the estate under §83 of the Decedent Estate Law (right of surviving spouse to share) and objected to the probate of the will.

It is urged by Bathelt that a sentence of imprisonment for life has no effect on the marital relation, but that the marital relation continues unless and until the innocent spouse remarries. The Surrogate held against such a contention. The Appellate Division reversed the Surrogate and held for Bathelt (259 A.D. 196, 198)

Judge Conway, speaking for a unanimous court, quotes §511 of the Penal Law. "Consequence of sentence to imprisonment for life. A person sentenced to imprisonment for life is thereafter deemed civilly dead." Judge Conway then says that while the Legislature has not provided an express remedy under these circumstances either by way of divorce or annulment, it has made other provisions which quite clearly indicate that for certain purposes a life sentence of the husband ipso facto terminated the marriage, quoting Domestic Relations Law §6 Subd 2 (a marriage is void if contracted by a person whose husband or wife by a former marriage is living unless such husband or wife has been finally sentenced to imprisonment for life); also a similar provision in the Penal Law in regard to the crime of bigamy (Penal Law §340).

Judge Conway then points out that historically the marriage is not deemed dissolved for all purposes by reason of civil death, citing cases and excerpts therefrom (page 352). He says "These cases lead to the conclusion that civil death was given the same ef-

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fect as actual death at common law, and in equity only insofar as was required for the protection of wife or child. This would appear also to be the present legislative attitude, since Correction Law §§320, 322, assumes the continuance of the marriage despite civil death so as to permit the husband or wife to apply to the Supreme Court for the appointment of a committee of the estate, both real and personal, of one sentenced to imprisonment in this State for life and for the payment of income or principal of such property for the support, education and maintenance of such persons as the convicted one would be legally liable to support if he had not been convicted**** A pardon granted to one centenced to life imprisonment within this State does not restore that person the the rights of a previous marriage." (Domestic Relations Law §58.)

Up to this point the Court is proceeding by analogy to reac its determination, by considering the effect of such a sentence on certain property rights and by analagous statutes.

The Court then proceeds to consider the statute law on the subject, starting with Revised Statutes, 2 R.S. p.701 §20, afterwards reenacted in the Penal Code §708, which declared that a person sentenced to imprisonment for life "shall thereafter be deemed civilly dead." His political rights were taken away from him, his wife and children owed him no fealty or obedience. (Avery v. Everett, 110 N.Y. 317, 333.)

Judge Conway says "Some authorities have indicated that the marriage continues until the election of the innocent spouse to terminate it. (Jones v. Jones, 249 A.D.470, 472, affd 274 N.Y. 574; Matter of Gargan v. Sculley, 82 Misc. 667; Brookman v. Brookman, 161 Misc 741). The meaning of the word election as so used is not entirely clear. It is urged that an election would be evidenced by the bringing of an action seeking a declaratory judgment. Certainly it would be disclosed by remarriage. It is also argued that it could be shown by acts which reached neither the dignity of court action nor the finality of remarriage. Let us then consider these methods."

"An action seeking a declaratory judgment entails expense which it might not be within the power of many wives to meet. More important, however, seems the uselessness of the provisions of the judgment to be sought. What should it declare? That the husband is in prison for life? A certificate would show that. That he is civilly dead? The Legislature has declared that. What then? There can be nothing more. The life imprisonment is ground for neither divorce nor annulment." (C.P.A. Articles 67, 68).

Shall we say that an election may be shown by other acts of the wife? What form would that election take? In one of the affidavits submitted here, counsel deposes that the decedent consulted him as to whether she should obtain a divorce and that he told her that it "was not necessary for her to bring any action or legal proceedings against Bathelt but that she was free to remarry at any time she chose. She asked me what papers were necessary and I said that all she had to do was to present a certified copy of conviction and

sentencing to the marriage license bureau." Would that be considered an election despite her continued correspondence? Would the fact that she referred, in the paper offered to probate, to Bathelt as her former husband and that she signed and initialed it with her maiden name be considered an election?

If not, must we say that the only election she could make would be by a remarriage? If that were so, then a sensitive woman who had married one who had committed murder a few days before their marriage might shrink with horror from remarriage and, consequently, at her death would leave a spouse entitled to a portion of her estate whereas another woman, less sensitive, by remarriage would cease to have a murderer as a husband. Again, no suitor might present himself under the circumstances, or religious tenets might forbid remarriage. The termination of rights of property succession should not depend upon questions of fact or varying circumstances such as these.

Judge Conway concludes, "We think there are many reasons why it is more logical to hold that it is the sentence of life imprisonment, with consequent civil death, which ipso facto acts upon and affects the marital relation at least to the extent of liberating the husband or wife of the one sentenced and the property of such husband or wife from all the property obligations and restrictions arising from the relation, rather than to have such liberation depend upon some subsequent act of the innocent spouse."

Bathelt urged that the rejection of his answer works a forfeiture of his property. The Court says: "That is not so. Property passes at death only by reason of the Decedent Estate Law (§83) There are thus two applicable statutes: The Decedent Estate Law, and the Penal Law. The former gives a right of succession to the surviving spouse but the latter provides that one is not a surviving spouse who has been sentenced to life imprisonment. Such a one is civilly dead. There is no conflict and no forfeiture."

The erudite opinion of Judge Conway exhausts the possibilities that one might discuss concerning this question. It has been adjudicated in very few States. The writer concludes that the decision reached is a fair one, from the standpoint of law as law and law as justice.

J. F. R.

DOES A NON-RESIDENT BECOME A TECHNICAL RESIDENT BY SERVICE UNDER §52 OF VEHICLE & TRAFFIC LAW?- An interesting moot question has recently arisen concerning an interpretation of §52 of the Vehicle & Traffic Law. This often used statute is that which deals with the service of summons on non-residents who have themselves operated a motor vehicle on the public highways of the State, or have consented to such operation by means of permitting another to do so with the consent of the owner. Such operation is deemed equivalent to an appointment by such non-resident of the of the Secretary of State to be his true and lawful attorney upon whom may be served the summons in any accident in which such non-resident may be involved while operating a

motor vehicle on such a public highway. Thus far there seems to be no ambiguity or cause for dissension. However, a problem has come to the minds ofthose students of the law who are curious to know what effect such a statute might have upon §903 of the Civil Practice Act. The question is, whether or not such a motor vehicle may be attached as additional security when service has been made upon the Secretary of State.

The apex of the discussion is this particular sentence in the statute: "****that such summonsagainst him when so served shall be of the same legal force and validity as if served upon him personally within the State and within the territorial jurisdiction of the court from which summons issues." (§52 Vehicle & Traffic Law)

A theory has been advanced that the necessary interpretation of the above statute must as a matter of law place the non-resident motorist in the same category as a resident of the State. It is argued that by coming into the State and driving upon the public highways thereof, the non-resident consents that for the purpose of service of summons, he is in exactly the same position as a resident of New York. It is further stated that such a person is not merely a non-resident who by statute allows himself to be personally served, but in truth he does assume the proportions of a resident in fact. If the above interpretation be correct, that is, if the non-resident motorist is classified as a resident when service is made under this statute, then it follows that such facts alone would not be sufficient to grant a warrant of attachment under §903 of the C.P.A., for special circumstances must be shown to grant such a provisional remedy against a defendant resident.

Such a line of reasoning is not difficult to follow, although I believe it to be an incorrect assumption; §903 of the C.P.A. clearly defines and states in what instances a warrant of attachment may be granted. The first subdivision clearly states that such a warrant may be issued in actions against either a foreign corporation or a non-resident defendant, in an action for a sum of money only. If the action be one against a resident, either a natural person or a domestic corporation, special circumstances must be shown. The logical conclusion which must be reached by the above interpretation creates a most unusual situation. It is argued that when a non-resident is served under §52 of the V.& T.L., a warrant of attachment can not be granted unless special circumstances are revealed despite the fact that the defendant is a non-resident, because he has technically become a resident by driving on the public highways of the State. It has been further stated that, to grant such a warrant would be unconstitutional since it would be deprivation of property without due process of law, as well as a discrimination between technical resident and actual resident in similar positions, thus violating the "equal protection" clause of the Constitution.

While such a position would seem the product of ingenuity in the attempt of a defendant to vacate a warrant of attachment, I do not believe it can be upheld as correct legal interpretation. In the first instance, §52 V.& T.L. does not specifically or impliedly

place the defendant non-resident in the same category as a de jure resident. All that it attempts to do is create a means of constructive service against a non-resident giving the court a personal jurisdiction. This has been upheld by the Supreme Court of the United States. But is it not true that a personal jurisdiction may be obtained over a non-resident by personal service within the State? Such a statement cannot be questioned. When a non-resident is personally served with summons within our jurisdiction, we gain complete power over his person. And when such a non-resident has been so served, there is no doubt that a warrant of attachment may be obtained solely by reason of his non-residence! The cases on this subject are too commonplace and numerous to mention. In such cases the personal jurisdiction is obtained by service of a summons on a non-resident who actually is within our territorial boundaries. At the time of service, he certainly is in the "same position" as a resident, yet a warrant of attachment will be granted purely by reason of his residence without the State, - the warrant being but a form of security and the amount of the recovery not limited to the attached property. Why, then, should the non-resident who named the Secretary of State as his agent for personal service be given special privileges? I believe, as a matter of law, that he should not.

From this, therefore, we may draw a direct analogy to the defendant non-resident whose car was attached and who was himself served personally under §52 V.& T. L; §903 C.P.A. is clear and unambiguous. It should in no way be modified by such an interpretation of the Vehicle and Traffic Law as has been suggested. A defendant is a non-resident whether he is served within or without the State under C.P.A. §903. It seems clear from this point of view that a warrant of attachment may be granted against a non-resident defendant who has been served as stated above, solely because of his foreign residence.

S.W.R.